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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DORA MAGANA,

Plaintiff and Appellant,

v.

ASHKAN LASHKARI, et al.,

Defendant and Respondent.

B262012

(Los Angeles County  
Super. Ct. No. LC099574)

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APPEAL from a judgment of the Superior Court of Los Angeles County, Russell S. Kussman, Judge. Affirmed.

Law Offices of Gabor Szabo and Gabor Szabo for Plaintiff and Appellant.

Reback, McAndrews, Kjar, Warford & Stockalper, Patrick Stockalper and Carlos E. McManus for Defendant and Respondent Ashkan Lashkari.

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Dora Magana sued Ashkan Lashkari, M.D., among others, alleging medical malpractice. Lashkari successfully moved for summary judgment, and Magana appeals. We affirm the judgment.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On September 29, 2011, Magana visited Lashkari, a hematologist. Magana reported that she was pregnant and that she had a distant history of deep vein thrombosis, and she inquired whether she should undergo prophylactic anticoagulant therapy during her pregnancy. Lashkari examined Magana and did not prescribe anticoagulant therapy. He recommended that she use support stockings and elevate her legs as the pregnancy progressed. He also instructed Magana to follow up with him immediately if problems arose during her pregnancy.

On October 12, 2011, Magana telephoned Lashkari's office and left a message for him complaining of significant pain in her leg and calf. Lashkari returned Magana's phone call the same day and instructed her to undergo an ultrasound immediately. The ultrasound revealed no evidence of deep vein thrombosis. On October 14, Magana went to a hospital complaining of leg pain; she was examined and an ultrasound examination performed. The ultrasound revealed no sign of thrombosis formation, and Magana was discharged. Magana was admitted to a different hospital on October 22 with worsened pain and swelling in her right lower leg. An initial ultrasound examination was negative for deep vein thrombosis, but a subsequent ultrasound showed that Magana had a deep vein thrombosis in her right leg.

Magana sued Lashkari and other defendants for medical malpractice and negligent infliction of emotional distress. She later dismissed her claim against Lashkari for negligent infliction of emotional distress. Lashkari moved for summary judgment, contending that Magana could not prevail on her medical malpractice claim because the care and treatment he provided was within the standard of care and because his actions or inactions caused her no injury.

Both parties submitted evidentiary objections. The trial court overruled Magana's objections. It sustained the majority of Lashkari's evidentiary objections, excluding the entire declaration of Magana's expert witness as well as a brief letter signed by another doctor that Magana had submitted to the court. The trial court found that Lashkari had satisfied his burden of persuasion that there was no triable issue of material fact concerning the elements of causation and compliance with the standard of care, and that Magana had failed to show by admissible evidence that there existed a triable issue of material fact as to these elements. The court granted summary judgment in Lashkari's favor. Magana appeals.

## DISCUSSION

"[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) "Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material fact exists" as to the cause of action. (Code Civ. Proc.,<sup>1</sup> § 437c, subd. (p)(2).) A triable issue of material fact exists where "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, at p. 850.)

Although Magana argues that granting the motion was an abuse of discretion, we review the trial court's ruling granting a summary judgment de novo and independently examine the record to determine whether there is a triable issue of material fact. (*Aguilar, supra*, 25 Cal.4th at p. 860.) In performing our review, we consider all evidence presented by the parties in connection with the motion (except that which the trial court properly excluded) and all uncontradicted inferences that the evidence

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<sup>1</sup> Unless otherwise indicated, all statutory references are to the Code of Civil Procedure.

reasonably supports. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) In so doing, we strictly construe the moving party's evidence and liberally construe the opposing party's, "accept[ing] as undisputed fact only those portions of the moving party's evidence that are uncontradicted by the opposing party." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1001.) We affirm the summary judgment if the papers and pleadings show that there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (§ 437c, subd. (c).)

### **I. Lashkari's Initial Burden**

Lashkari satisfied his burden of showing that no triable issue of material fact existed as to causation and compliance with the standard of care by submitting the declaration of Casey O'Connell, M.D., a board-certified hematologist. O'Connell reviewed Magana's medical records, imaging studies, and deposition testimony. Based upon her review of this evidence and her knowledge, training and experience, O'Connell opined that the care that Lashkari provided Magana on September 29, 2011, comported with the standard of care; that his response to Magana's subsequent phone call to his office comported with the standard of care; and that no negligent action or failure to act on his part caused Magana injury.

Magana argues that O'Connell's declaration was insufficient to satisfy Lashkari's burden because it was based on disputed material facts and internally contradictory medical records and because "issues of fact remain as to facts" upon which O'Connell relied in forming her expert opinion. Specifically, she first asserts that unspecified excerpts from her deposition demonstrate the existence of "disputed issues of fact" as to "what was discussed" by Magana and Lashkari at the consultation and "what disclosures were made to Plaintiff." She argues that in her declaration O'Connell repeated the contents of Lashkari's consultation letter and "simply conclude[d] that Defendant Dr. Lashkari complied with his disclosure requirements." Magana does not further explain this contention or identify any specific passages in her deposition or O'Connell's declaration concerning the consultation or disclosures, instead referring the court to her

deposition and Lashkari's consultation letter in their entirety. Moreover, we are unable to locate in O'Connell's declaration any passage in which she discussed disclosure or disclosure requirements.

Magana's assertion is insufficient to raise any issue cognizable on appeal. "On review of a summary judgment, the appellant has the burden of showing error, even if he did not bear the burden in the trial court. [Citation.] . . . "[D]e novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed." [Citation.]' [Citations.]" (*Bains v. Moores* (2009) 172 Cal.App.4th 445, 455.)

Second, Magana argues that O'Connell's declaration is false because it states that at the September 29 consultation Lashkari reviewed lab results for blood samples drawn the previous day, when Magana's medical records indicate that her blood was drawn on September 21. As Magana did not offer any evidence that whether the blood samples were taken on September 21 or September 28 was material to whether Lashkari complied with the standard of care, she has not established that O'Connell's declaration was insufficient to meet Lashkari's burden in moving for summary judgment.

Third, Magana contends that O'Connell's conclusion that Lashkari's treatment efforts were inhibited by Magana's failure to heed his instructions to follow up with his office right away was unsupported by the record because she contacted Lashkari's office on either October 10 or 12. O'Connell's declaration, however, acknowledges that Magana contacted Lashkari's office on October 10 or October 12 (both dates appear in the declaration), but states that Magana's failure to contact him after that final communication prevented him from monitoring her condition and offering further treatment recommendations. Magana has not demonstrated that this conclusion lacked factual support.

Fourth, Magana argues that a discrepancy between her medical records and other evidence concerning the date that Magana called Lashkari's office (October 10 or October 12) "raises the question why the record reflects a different date and whether the record was altered to show a more prompt response" by Lashkari.<sup>2</sup> Magana notes that she testified, and O'Donnell declared, that her call was made on October 10 and returned on October 11, but that this conflicts with the medical record showing that the call was made and returned on October 12. In her separate statement in opposition to the motion for summary judgment, however, Magana acknowledged as an undisputed material fact that she telephoned Lashkari's office on October 12 and received a call in response from Lashkari the same day instructing her to undergo an ultrasound examination immediately. Even if there existed discrepancy as to the date of her call, Magana has not offered evidence that the date of the call is material. An opposing party cannot controvert a moving party's declarations by evidence based on speculation, imagination, guesswork, or mere possibilities. (*Doe v. Salesian Society* (2008) 159 Cal.App.4th 474, 481 (*Doe*).)

Finally, Magana asserts that O'Connell's declaration was based on flawed or altered data because her medical records contain other discrepancies. She contends that the absence of a record that Lashkari prescribed magnesium to her on September 29 indicates that "[p]erhaps Defendant's record was altered by removing that embarrassing prescription as it would be a per se proof of misdiagnos[is]." She further claims that Lashkari's consultation note and subsequent letter stating that Magana denied any swelling in her leg are contradicted by her notation concerning leg swelling in a

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<sup>2</sup> In a footnote to this argument, Magana describes statements purportedly made at the hearing on the summary judgment motion. No court reporter was present at the hearing, and the record does not show that Magana sought a settled statement. (Cal. Rules of Court, rules 8.137, 8.346.) A reviewing court may not consider alleged facts that are outside the record on appeal. (*CIT Group/Equipment Financing, Inc. v. Super DVD, Inc.* (2004) 115 Cal.App.4th 537, 539, fn 1.)

questionnaire she completed for Lashkari,<sup>3</sup> and posits that Lashkari misrepresented her report “to cover up the obvious [] signs of [deep vein thrombosis] and Defendant’s responsibilities for failing to diagnose the condition and misdiagnosing it as [a m]agnesium deficiency.” Magana’s speculation, supported by no evidence that the records were altered or that a magnesium prescription would have been proof of misdiagnosis, offers no basis to disregard O’Connell’s conclusions or to conclude that there existed a triable issue of material fact as to negligence. (*Doe, supra*, 159 Cal.App.4th at p. 481.)

## **II. Magana’s Burden**

Lashkari’s showing shifted the burden to Magana to show that a triable issue of fact existed concerning compliance with the standard of care and causation. In a medical malpractice action, “‘When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence.’ [Citations.]” (*Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 985.) Magana submitted the declaration of George Kovacs, M.D., and a statement by Stanley Rossman, M.D., both of which were ruled inadmissible by the trial court. Magana argues that the court erred when it excluded this evidence and that she established the existence of triable issues of material fact requiring the court to deny the motion for summary judgment.

We first consider the Rossman statement, submitted as an exhibit to the declarations of Kovacs and Magana. The statement consisted of a single sentence stating

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<sup>3</sup> Magana checked the line for “Swelling of ankles/legs” on Lashkari’s questionnaire as a symptom that she experienced at that time or in the past. The questionnaire did not ask Magana to distinguish between present and past symptoms, and she did not specify whether she was experiencing leg swelling at the time of her appointment or whether she had experienced it only in the past. Magana testified at deposition that at the time of her appointment with Lashkari her leg was not swollen, and that it began to swell afterwards.

that it was Rossman’s opinion that “based on the patient’s history and symptoms, based on the patient’s request for blood thinner shots, and based on the examination of this patient, [the] previous doctor should have realized and diagnosed the onset of blood clots in the patient’s right leg and should have directed further exams, treatments and care regarding the same.” While the standard of review applicable to evidentiary rulings on summary judgment remains unsettled (see *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535 [declining to decide whether the trial court’s rulings on evidentiary objections in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo]), under any standard of review the trial court properly excluded this statement. It was deficient in form, as it was not a sworn affidavit (§ 2003), lacked a declaration under penalty of perjury (§ 2015.5), and was not among the types of evidence authorized to be submitted in opposition to a motion for summary judgment. (§ 437c, subd. (b)(2).) Moreover, although expert declarations submitted in opposition to motions for summary judgment are liberally construed (*Garrett v. Homedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 189; *Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 125-126), the opining expert must have sufficient skill or experience so that his or her opinion would be likely to assist the jury in the search for the truth. (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1319.) Rossman’s statement did not demonstrate that he had the requisite knowledge, learning and skill with the subject of his statement to speak with authority about it, nor did he make any representation that he was familiar with the standard of care applicable to Lashkari.

Relying on the decision in *Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142, in which the Supreme Court noted that on review of summary judgment the evidence of the losing party is construed liberally “in order to resolve any evidentiary doubts or ambiguities” in its favor, Magana argues that the trial court should have “assume[d]” that she could have authenticated Rossman’s statement, which was written on his letterhead, because Rossman was Magana’s treating physician. Even if we were to accept this argument, because a lack of authentication was only one of the



reasons that Rossman's single-sentence statement was inadmissible, Magana has not demonstrated any error in excluding this document.

Magana next asserts that even though the Rossman statement may have had "imperfections," it nonetheless indicated that she could reasonably obtain the needed evidence and expert opinion to prevail at trial. She argues that the court, in viewing her evidentiary showing in the light most favorable to her and resolving all ambiguities in her favor, should have concluded that Rossman, whom she describes as refusing to execute a declaration criticizing his colleague, could have been compelled to testify against Lashkari. A party opposing summary judgment cannot satisfy his or her burden of production with declarations consisting of inadmissible evidence. (*Bozzi v. Nordstrom* (2010) 186 Cal.App.4th 755, 761.)

Magana's other excluded expert evidence was the declaration of Kovacs, a gynecologist and obstetrician who identified himself as a "non-retained expert" and the treating physician who referred Magana for a hematology evaluation. Kovacs broadly opined that Magana "received substandard care and treatment from all of the doctors who saw Magana after [his] referral" and that the delay in diagnosing her condition caused it to worsen and necessitated her hospitalization.

"[I]t is our responsibility in reviewing an order granting summary judgment to independently determine the effect of the evidence submitted." (*Lincoln Fountain Villas Homeowners Assn. v. State Farm Fire & Casualty Ins. Co.* (2006) 136 Cal.App.4th 999, 1010, fn. 4.) Even if we accept the Kovacs declaration "as part of the record to be considered in determining whether a triable issue of material fact exists, its multiple deficiencies as an expert opinion require the conclusion that, as a matter of law, it is insufficient to defeat summary judgment." (*Ibid.*; accord, *Cheviot Vista Homeowners Assn. v. State Farm Fire & Casualty Co.* (2006) 143 Cal.App.4th 1486, 1500, fn. 9.) Kovacs' declaration affirmatively demonstrated that he lacked any factual basis for rendering an expert opinion on Lashkari's care and treatment of Magana. Kovacs listed the records he reviewed in reaching his conclusions about the care Magana received; neither Lashkari's records nor O'Connell's declaration were among them. Having failed

to review any records concerning Lashkari's treatment of Magana, Kovacs lacked any basis upon which to render an expert opinion concerning Lashkari's actions, and his declaration was therefore insufficient to defeat the motion for summary judgment. The court properly granted summary judgment in Lashkari's favor. (§ 437c, subd. (c).)

Magana argues, however, relying on the California Supreme Court's statement that California law requires "a defendant moving for summary judgment to present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence" (*Aguilar, supra*, 25 Cal.4th at p. 854, footnote omitted), that summary judgment was inappropriate because Lashkari did not prove that she could not reasonably obtain needed evidence to prevail at trial. The *Aguilar* court delineated the two ways for a moving party to satisfy its burden on summary judgment: the movant may either "present evidence that conclusively negates an element of the plaintiff's cause of action," or "present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Id.* at p. 855.) Lashkari chose the first option and presented evidence negating two elements of Magana's medical negligence cause of action: compliance with the standard of care and causation. This was sufficient to satisfy his burden on summary judgment under *Aguilar*.

Magana also contends that the trial court impermissibly determined that O'Connell's opinion testimony was more credible than the views of Kovacs and Rossman, a decision belonging to the jury. The record does not reflect that the court evaluated the credibility of the three medical professionals.

Finally, Magana argues that summary judgment was not proper because no medical expert opinion was necessary to determine that Lashkari's conduct with respect to her October 10 or 12 telephone call fell below the standard of care. Magana asserts that when she contacted Lashkari's office to report her pain, "Lashkari refused to see her or talk to her" and "felt no need to re-examine her," and that this constituted a refusal to treat her that showed medical neglect. Magana contends that Lashkari provided no expert opinion that he acted within the standard of care when he did not re-examine her, and that summary judgment was therefore improper on this aspect of her claim. O'Connell,

however, did address Lashkari's response to Magana's telephone call in her expert declaration. She opined that Lashkari "acted within the standard of care when he instructed Ms. Magana to undergo an ultrasound examination on October 10, 2011, after she called with complaints of leg pain and swelling. In issuing this instruction and facilitating the examination, Dr. Lashkari took appropriate steps to ensure that Ms. Magana was screened for possible [deep vein thrombosis]. The standard of care did not require anything more of Dr. Lashkari." Magana has not established any error in granting summary judgment.

### **DISPOSITION**

The judgment is affirmed. Respondent shall recover his costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.